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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: SAN ANTONIO, TX

Date: JAN 24 2005

IN RE:

Applicant:

APPLICATION:

Application for Certificate of Citizenship pursuant to Section 301 of the former Immigration and Nationality Act; 8 U.S.C. § 1401.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Dallas, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Mexico on May 10, 1976. The applicant's father, Jaime Noland Nava (Mr. Noland), was born in Mexico on December 5, 1951, and he derived U.S. citizenship at birth through a U.S. citizen parent. The applicant's mother, [REDACTED] was born in Mexico on December 11, 1958, and she is not a U.S. citizen. The applicant's parents married in Mexico on June 19, 1972. His parents divorced in Mexico on September 22, 1986. The applicant seeks a certificate of citizenship pursuant to section 301 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1401, based on the claim that he acquired U.S. citizenship at birth through his father.

The district director found that the applicant had failed to establish his father was physically present in the United States for ten years prior to the applicant's birth, at least five years of which were after Mr. [REDACTED] reached the age of fourteen, as required by section 301 of the Act. The application was denied accordingly.

On appeal, the applicant asserts that an affidavit written by his paternal uncle [REDACTED] demonstrates Mr. [REDACTED] early work history in the United States. The applicant asserts further that a divorce decree and a letter from his mother demonstrate that Mr. [REDACTED] had legal custody of the applicant prior to his eighteenth birthday.

The AAO notes that the applicant's reference to his parent's divorce and his father's legal custody over the applicant appears to relate to the possibility of a citizenship claim under section 321 of the Immigration and Nationality Act (former Act); 8 U.S.C. § 1431. Section 321 of the former Act stated, in pertinent part that:

(a) a child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

- (1) The naturalization of both parents; or
- (2) The naturalization of the surviving parent if one of the parents is deceased;
or
- (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if-
- (4) Such naturalization takes place while said child is under the age of 18 years;
and
- (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

The AAO notes that the applicant's father derived U.S. citizenship at birth, and that he thus did not become a naturalized U.S. citizen. The AAO notes further that the applicant has never resided in the United States

pursuant to a lawful admission for permanent residence. The applicant therefore does not qualify for consideration under section 321 of the former Act.

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Chau v. Immigration and Naturalization Service*, 247 F.3d 1026, 1029 (9th Cir. 2000) (citations omitted). The applicant was born on May 10, 1976. Section 301(a)(7) of the former Act is therefore applicable to his derivative citizenship claim.

Section 301(a)(7) of the former Act, 8 U.S.C. § 1401(a)(7) states in pertinent part that:

The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States . . . for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

In the present matter, the applicant must establish that his father was physically present in the U.S. for ten years between December 5, 1951 and May 10, 1976, and that five of those years occurred after December 5, 1965, when Mr. [REDACTED] turned fourteen.

The evidence relating to Mr. [REDACTED] physical presence during the requisite time period consists of the following:

An affidavit, written on November 14, 2003, by the applicant's paternal uncle, [REDACTED] stating that he and Mr. [REDACTED] worked in the United States every year for four to five months, **between approximately 1964**, when Mr. [REDACTED] was thirteen years old, **and 1968**. The affidavit states that Mr. [REDACTED] and his siblings applied for and obtained U.S. citizenship in 1968, and that Mr. [REDACTED] subsequently resided in Texas until 1991.

Mr. [REDACTED] Application for Certificate of Citizenship, dated September 1968, reflecting an address in Matamoros, Tamaulipas, Mexico, and stating, **"I have always resided in Mexico"**.

Mr. [REDACTED] U.S. Certificate of Citizenship, dated October 23, 1968, stating that Mr. [REDACTED] resided in Matamoros, Tamaulipas, **Mexico**.

Mr. [REDACTED] marriage certificate reflecting that he resided in Estacion Ramirez, Tamaulipas, **Mexico** and married the applicant's mother in Mexico on June 19, 1972.

Mr. [REDACTED] replacement Certificate of Citizenship, dated April 30, 1974, stating that he resided in Matamoros, Tamaulipas, **Mexico**.

Mr. [REDACTED] Form N-565, Application for New Citizenship or Naturalization Paper (N-565 application), filed on April 12, 1974, stating that Mr. [REDACTED] resided in Brownsville, **Texas**, and that his mailing address was in Mexico.

An April 1987, N-600 Application for Certificate of Citizenship (N-600 application) filed on the applicant's behalf by his father, stating that Mr. [REDACTED] resided in the **United**

States from 1968 through the date of filing on April 24, 1987.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. In *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989), the Commissioner indicated that under the preponderance of evidence standard, it is generally sufficient that the proof establish that something is probably true.

The AAO finds that the applicant has failed to establish by a preponderance of the evidence that Mr. [REDACTED] was physically present in the United States prior to October 1968. The AAO finds that the affidavit written by [REDACTED] contradicts other evidence in the record, including written statements made by Mr. [REDACTED]. Moreover, the affidavit is unsupported by corroborative evidence and lacks material information and detail regarding specific dates of residence or addresses of places that Mr. [REDACTED] resided in the United States. The AAO finds further that the remaining evidence contained in the record fails to establish that Mr. [REDACTED] was physically present in the U.S. for ten years between December 1951 and May 1976, at least five years of which occurred after December 1965.

Because the applicant failed to meet the burden of establishing his citizenship claim by a preponderance of the evidence, the appeal will be dismissed.

ORDER: The appeal is dismissed.